



ATTORNEYS AT LAW
The Wilenchik & Bartness Building
2810 North Third Street Phoenix, Arizona 85004

Telephone: 602-606-2810 Facsimile: 602-606-2811

Dennis I. Wilenchik, #005350

John D. Wilenchik, #029353

admin@wb-law.com

Attorneys for Non-Party Alan Dershowitz

**IN THE UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA**

Kari Lake and Mark Finchem,

Plaintiffs,

v.

Kathleen Hobbs, et al.;

Defendants.

Case No. 2:22-cv-00677-JJT

**REPLY IN SUPPORT OF APPLICATION
FOR ORDER TO SHOW CAUSE**

(Oral Argument Requested)

Because Rule 11 awards “*must be limited* to what suffices to deter repetition of the conduct or comparable conduct by others similarly situated,” and the County fails to allege any conduct by Mr. Dershowitz in the past, present or future that would be “deterred” by assessing fees against him, then no amount of fees should be assessed against Mr. Dershowitz or his consulting firm in this matter. Fed.R.Civ.P.11(c)(4)(emphasis added); *see also* Advisory Committee’s Notes on Fed. Rule Civ. Proc. 11, 28 U.S.C. App., p. 129 (1982 ed., Supp. V). To assess fees under 28 U.S.C. § 1927 likewise requires a specific finding that a named attorney has acted recklessly or in bad faith; and “[l]ike the purpose of Rule 11, [its] goal ... [is] not to make a party whole, but to deter and punish.” *Tildon-Jones v. Boladian*, 581 F. App’x 493, 498 (6th

1 Cir. 2014); *United States v. Associated Convalescent Enterprises, Inc.*, 766 F.2d 1342, 1346 (9th
2 Cir.1985); *see also Barnd v. City of Tacoma*, 664 F.2d 1339, 1343 (9th Cir.1982)(reversing
3 award due to lack of specific finding that counsel acted in bad faith). But the County offers no
4 evidence to support a specific finding that Mr. Dershowitz acted recklessly, acted in bad faith, or
5 otherwise violated that statute. Indeed, no sanctions should be imposed on him because he,
6 personally, did no wrong. At worst, he may have made an honest mistake about the state of an
7 “of counsel” consultant under Arizona law and practice.

8 Rather, the County argues that Mr. Dershowitz should be held summarily responsible for
9 the entirety of its \$141,690.00 in attorneys’ fees because of the “/s/” signature that appeared for
10 him on filings, and because of his alleged passive participation in a phone call(s) or in listening
11 to a court proceeding. The County fails to allege that Mr. Dershowitz personally advanced any
12 improper position or claim in such teleconference(s), court proceedings, pleadings or otherwise,
13 or that he acted recklessly or in bad faith in any respect. To assess sanctions here for such vague
14 and unsupportable reasons would not serve the fundamental purpose of “deterrence” that Rule
15 11 and 28 U.S.C. § 1927 are designed to serve. The record stands undisputed that Mr.
16 Dershowitz’s role was very limited and narrow in scope, and that he was not involved in the
17 actual issues this Court has deemed sanctionable. In fact, he spent approximately three (3) hours
18 in total on this case, again focusing on the single potential constitutional issue for which he was
19 retained to consult as “of counsel.” (See Second Declaration of Alan Dershowitz, ¶ 1, submitted
20 herewith; *see also* Declaration of Andrew Parker, submitted herewith). He has served in such
21 capacity in many proceedings in the past, never intending thereby to endorse arguments or
22 positions advanced by co-counsel or expecting to be sanctioned for conduct in which he did not
23 participate. There is no doubt that he is an accomplished constitutional jurist who has consulted
24 on many notable cases in such capacity, without necessarily agreeing with or endorsing other
25 substantive positions taken by co-counsel. If he is wrong in this basic assumption, then he
26

1 apologizes for such a mistake and will not repeat it – but it is an honest mistake, if a mistake at
2 all. He represents that if he was mistaken, he will not repeat his mistake in any future filing.
3 Assessing fees against him here would advance no beneficial purpose and would only serve to
4 deter him and other eminent legal scholars from trying to offer their well-reasoned opinions and
5 research to counsel and to the Court on areas of their expertise, with the ultimate effect of
6 stunting the development of law surrounding complex issues such as the one on which Mr.
7 Dershowitz was retained (regarding the constitutional ramifications of public access to records
8 held by private government vendors). Assessing sanctions against him for this limited role
9 would not, in this or in any other case, deter improper pleadings, motions or papers or positions
10 taken by others. Of the matters and claims that the Court deemed sanctionable, none implicated
11 his participation in this case, and the County points to no evidence otherwise.

12 The County points out that Mr. Dershowitz was admitted *pro hac vice* in this matter—but
13 in fact, as the court docket reflects, there was an unusual history on this issue that also serves to
14 emphasize his limited role. Mr. Dershowitz’s expressed intent was always to be “of counsel”
15 only, and he did not believe that he needed to be admitted *pro hac vice* to serve in that role. (See
16 Declaration of Alan Dershowitz, ¶ 4.) An administrative order was entered on May 18, 2022
17 terminating him “for noncompliance with admission procedures; party or parties represented by
18 other admitted counsel.” Mr. Dershowitz was informed by his co-counsel that he needed to be
19 admitted *pro hac vice* despite his “of counsel” role; and so his *pro hac vice* paperwork was
20 submitted. (*Id.*) Mr. Dershowitz’s *pro hac vice* motion was granted on June 15, 2022, which
21 was around one-and-a-half months after the Amended Complaint was filed. These facts clearly
22 do not support a substantial role in this litigation for Mr. Dershowitz, nor do they evidence that
23 he personally or primarily advanced any improper claim or matter in violation of Rule 11 or
24 28 U.S.C. § 1927.

1 In drafting Rule 11, the Advisory Committee specifically “[r]ecogniz[ed] the need to
2 tailor the sanction to each particular situation, [and] the Advisory Committee emphasized...the
3 need for ‘flexibility’ in dealing with violations.” *Pavelic & LeFlore v. Marvel Ent. Grp.*, 493
4 U.S. 120, 130 (1989) (Marshall, J.). “Flexibility is no less important when a judge decides
5 whether one, some, or all of the many entities before him should be held responsible for
6 improper pleadings, motions, or papers.” *Id.* Where there is no evidence that a lawyer has
7 personally committed conduct that must be “deterred,” or that was reckless or in bad faith, then
8 an award of fees is unwarranted. Consistent with its function of “deterrence,” Rule 11 also
9 generally “de-emphasizes monetary sanctions and discourages direct payouts to the opposing
10 party.” *Rentz v. Dynasty Apparel Indus., Inc.*, 556 F.3d 389, 395 (6th Cir. 2009); *see also* Fed.
11 R. Civ. P. 11 Advisory Committee Notes (1993 Amendment). In fact, the Committee Notes
12 point to the availability of other sanctions that may be more targeted towards deterrence, such as
13 “issuing an admonition, reprimand, or censure; requiring participation in seminars or other
14 education programs; ordering a fine payable to the court; [or] referring the matter to disciplinary
15 authorities.” 12 Fed. R. Civ. P. 11 Advisory Committee Notes (1993 Amendment). In cases such
16 as this, where no intentional misconduct can be found on the part of Mr. Dershowitz, who has
17 practiced law for many years without any sanction or ethics violation, an award of fees against
18 Mr. Dershowitz would serve only to deter well-intentioned legal scholars from being associated
19 with litigation in any way, or from even listening in to court proceeding(s) or phone calls, which
20 ultimately will not result in a salutary effect on the legal system. Mr. Dershowitz already
21 acknowledges that if his approach to appearing as “of counsel” in this matter was inconsistent
22 with Arizona’s rules or procedure, then he will not do so again. (Declaration of Alan
23 Dershowitz, ¶ 4.) Further, a Bar complaint has unfortunately already been filed against him
24 arising out of this Court’s order, and so a referral to disciplinary authorities is unnecessary. As a
25
26

1 result of this sanction and complaint, he cannot apply for *pro hac vice* admission in other
2 jurisdictions including for *pro bono* cases, which constitute half of his consulting time.

3 Maricopa County's off-handed reference to sanctions against an attorney named L. Lin
4 Wood is unfairly prejudicial and confusing; Wood's case is clearly different from Mr.
5 Dershowitz. (Among other things, Mr. Wood was prominently and publicly involved in his
6 lawsuit, and in a court filing he even "took credit" for having filed it. *King v. Whitmer*, 556 F.
7 Supp. 3d 680, 702 (E.D. Mich. 2021).) Nor does the County meaningfully distinguish the series
8 of cases cited by Mr. Dershowitz in support of limiting sanctions to deter conduct by certain
9 counsel and not others. The County merely argues that Mr. Dershowitz's filings are untimely,
10 which they are not. (See following section.)

11 **This Application, and Dershowitz's Response to the Motion for Fees, Are Not Untimely**

12 It is proper and timely for the Court to hear Mr. Dershowitz's objections to being
13 assessed \$141,690.00 in attorney fees against him/his consulting firm. Indeed, we submit it is
14 absolutely necessary to do so. The apportionment of fees among counsel and parties has not
15 been previously addressed, and Mr. Dershowitz filed a timely response to the County's Motion
16 for Attorneys' Fees. Because the original Motion for Sanctions sought only sanctions against
17 "counsel" (and did not name him or expressly include "of counsel"), and because of his lack of
18 involvement in the case, he only became aware that he may have been the subject of a sanction
19 after media reports mentioned him by name in connection with the Court's sanctions order, at
20 which time he retained counsel to file the instant Application and Response to the Motion for
21 Attorneys' Fees. In *Barlow v. Am. Tel. & Tel. Co.*, 935 F.2d 273 (9th Cir. 1991), the Ninth
22 Circuit partly reversed a sanctions award that had been entered simply against "counsel," where
23 "counsel" could have referred to either one or both of two lawyers on the case; and it was
24 "unclear from the Magistrate's order precisely against whom the Rule 11 sanction was
25 imposed." *Id.*, 935 F.2d at 273 (reversing award of fees against one lawyer but not the other).
26

1 Mr. Dershowitz should clearly be afforded an opportunity to be heard, and/or to have his
2 declarations considered to support that his conduct did not contribute to anything sanctionable,
3 and therefore no amount of fees should be awarded against him or his consulting firm.

4 **Conclusion**

5 Mr. Dershowitz has not done anything improper that sanctions would serve to “deter” in
6 this matter, and therefore no amount of fees should be assessed against him or his consulting
7 firm. He respectfully requests that this honorable Court clear him of any claim of bad faith or
8 participation in any vexatious litigation.

9 **RESPECTFULLY SUBMITTED** on January 11, 2023.

10 **WILENCHIK & BARTNESS, P.C.**

11 /s/ Dennis I. Wilenchik

12 Dennis I. Wilenchik, Esq.

13 John D. Wilenchik, Esq.

14 The Wilenchik & Bartness Building

15 2810 North Third Street

16 Phoenix, Arizona 85004

17 admin@wb-law.com

18 *Attorneys for Non-Party Alan Dershowitz*

19 **CERTIFICATE OF SERVICE**

20 I hereby certify that on January 11, 2023, I electronically transmitted the foregoing
21 Notice of Filing to the Clerk of the Court through the CM/ECF system, which will send a Notice
22 of Electronic Filing to all CM/ECF registrants for this matter.

23
24 /s/ Christine M. Ferreira